SUBJECT INDEX.

PAGE

Notice of Application for Writ of Certiorari..... 1
Petition for Writ of Certiorari..... 3, 10
Certificate of Counsel..... 11
Petitioners' Points.....13, 36

I. Chapter 253 of the Laws of 1925 does not infringe any provision of the Federal Constitution. It does not deprive the New Jersey executors of George J. Gould of due process of law within the meaning of the Fourteenth Amendment 13, 36

(1) The action instituted against George J. Gould to require him to account as a trustee and as one of the managers of the Pittsburgh and Toledo Syndicate survived upon his death and is enforceable against his personal representatives 13, 14

(2) Since the cause of action against Gould survived and did not abate in consequence of his death, the petitioners were entitled to revive the action against his personal representatives, unless the fact of his residence in New Jersey and the administration of his estate there prevents such revival.....14, 16

(3) A proceeding to revive an action against a deceased defendant and to bring in his executors, is not the commencement of a new action, but merely the continuance of one actually pending at the time

PAGE

of death. Such a proceeding constitutes due process, although the persons sought to be brought in are non-residents of the State in which the action is pending.....16, 21

(4) The provision added to Section 160 of the Decedents' Estate Law by Chapter 253 of the Laws of 1925, in unmistakable terms deals with the precise situation existing in this case. The constitutionality thereof properly came up for determination in the proceedings now sought to be reviewed and was determined adversely to the petitioners in the highest Courts of New York having jurisdiction in the premises.....21, 24

(5) Regardless of what might be the rule in the case of the revival of an action under these circumstances against administrators appointed in a foreign jurisdiction, there is a distinct differentiation in the case of executors of a will probated in a foreign jurisdiction....24, 28

(6) Independently of this statute and of permissive legislation, it has been decided that actions may be maintained in the Courts of New York against foreign executors where it is necessary to prevent a failure of justice. That fact emphasizes the contention that Chapter 253 of the Laws of 1925 does not violate the due process clause.....28, 30

(7) Chapter 660 of the Laws of 1926, which undertook to repeal Section 160 of the Decedents' Estate Law, does not affect the proceedings at that time pending

PAGE

under subdivision 2 of Chapter 253 of the Laws of 1925.....31, 32

(8) The petitioners have exhausted all of their remedies by appeal open to them in the Courts of New York under the Civil Practice Act for the purpose of sustaining the constitutionality of Chapter 253 of the Laws of 1925, declared to be violative of the Fourteenth Amendment. Unless, therefore, they secure a hearing in this court, they will be unable to revive their action against Gould's executors, the decisions heretofore rendered constituting a finality so far as the State Courts are concerned. .32, 36

CASES CITED.

	PAGE
Allen v. Luke (163 Fed. 1018)	14
Bergdorf, Matter of (206 N. Y. 312)	28
Bergman v. Lord (194 N. Y. 70)	28
Cameron v. N. Y. & M. O. W. Co. (133 N. Y. 336)	32
Campbell v. Holt (115 U. S. 620)	21
Central Trust Co. v. Chicago, R. I. & P. Ry. Co. (218 Fed. 336)	35
Central Trust Co. v. United States Light & Heating Co. (233 Fed. 420)	35
Champlain v. McCrea (165 N. Y. 264)	32
Clarke v. Mathewson (12 Pet. 163)	14
Close v. Noye (147 N. Y. 597)	32
Colbert v. Daniel (32 Ala. 314)	28
Credits Commutation Co. v. United States (177 U. S. 311)	35
Danforth v. Croton Water Co. (178 Mass. 472)	21
Detroit & Mackinac Ry. Co. v. Michigan Railroad Commission (240 U. S. 564)	35
Dodd v. Wilkinson (41 N. J. Eq. 566)	14
Dunbar v. Boston & Providence R. R. Corpn. (181 Mass. 383)	21
Elsasser v. Haines (52 N. J. Law 19)	19
Farmers Loan & Trust Co., The, Petitioner (129 U. S. 206)	35
Fidelity & Casualty Co. v. Freeman (109 Fed. 847)	27
Fitzsimmons v. Johnson (90 Tenn. 428)	19

PAGE

Geneva R. R. Co. v. N. Y. C. & H. R. R. R. Co. (163 N. Y. 228) 32
Gould v. Gould (122 Misc. Rep. 152) 28
Grayson v. Harris (267 U. S. 352) 36
Gumbel v. Pitkin (113 U. S. 545) 35

Harrigan v. Gilchrist (121 Wis. 127) 14
Hartnet v. Wandell (60 N. Y. 346) 27
Hazard v. Durant (19 Fed. 417) 14
Helme v. Buckelew (229 N. Y. 363) 24
Henderson Bridge Co. v. Henderson City (173 U. S. 592) 36
Hill v. Tucker (13 How. 458) 24, 26
Holmes v. Camp (219 N. Y. 359) 28
Holmes v. Jennison (14 Pet. 540) 35
Hovey v. McDonald (109 U. S. 150) 35

Logan v. Greenwich Ins. Co. (144 App. Div. 372) ... 20
Lovejoy v. Bailey (214 Mass. 134) 14

Martin, Matter of (82 Misc. Rep. 589) 26
Michigan Trust Co. v. Ferry (228 U. S. 353) 18, 19, 26
Montgomery v. Boyd (78 App. Div. 64) 28
Mt. Vernon Woodbury Cotton Duck Co. v. Alabama Interstate Power Co. (240 U. S. 30) 35
McKnight v. Craig (6 Cranch. 187) 14
McMaster v. Gould (240 N. Y. 379) 21, 22, 24, 25
McNamara v. Dwyer (7 Paige 239) 28

Nations v. Johnson (24 How. 195) 17, 19, 26

O'Brien v. Blaut (17 App. Div. 288) 14

Peaslee v. Peaslee (147 Mass. 179) 19
Pennoyer v. Neff (95 U. S. 735) 18
People v. American Trust Co. (150 N. Y. 117) 34
People v. N. Y. C. & H. R. R. R. Co. (156 N. Y. 570). 32
Pierson v. Morgan (121 N. Y. 705) 14

PAGE

Robinson v. Robbins Dry Dock & Repair Co. (238 N. Y. 271) 21
Rogers v. Hennepin County (240 U. S. 184) 36

Southern Electric Co. v. Stoddard (269 U. S. 186) ..33, 34
Stokes v. Williams (226 Fed. 148) 35

White v. White (65 N. J. Eq. 747) 19
Wineburgh v. U. S. R. R. Adv. Co. (173 Mass. 60) .. 14

STATUTES.

Federal Statutes Annotated, 1921 Supp., p. 236 16
General Construction Law, Secs. 93, 94 .....31, 32
New York Civil Practice Act, Sec. 82 14
United States Revised Statutes, Sec. 955 15

Supreme Court of the United States

OCTOBER TERM, 1926.

No.

HENRY W. MCMASTER and FRANCIS H. SKELDING, as Receivers of the Wabash Pittsburgh Terminal Railway Company,
Petitioners,

against

GEORGE J. GOULD; KINGDON GOULD and SCHUYLER NEILSON RICE, as Executors of the Estate of George J. Gould, deceased,
Respondent.

PLEASE TAKE NOTICE that upon the annexed petition of Henry W. McMaster and Francis H. Skelding, as Receivers of the Wabash Pittsburgh Terminal Railway Company, and a certified copy of the entire transcript of record in this cause, including the proceedings in the Court of Appeals of the State of New York and the Appellate Division of the Supreme Court, First Department, which are the highest Courts in said State in which a decision of this cause could be had, submitted herewith, and the petitioners' brief hereto annexed, also to be submitted on the presentation of the petition, an application will be made to the Supreme Court of the United States at a session of said Court appointed to be held at The Capitol, Washington, D. C., on the 4th day of October, 1926, at the opening of Court on that day or as soon thereafter

as counsel can be heard, for a Writ of Certiorari to be directed to the Supreme Court of the State of New York, New York County, wherein the record herein is now lodged, to review the determination herein of the highest Courts of the State of New York having jurisdiction in the premises, denying a motion made by the petitioners to substitute the executors of the Estate of George J. Gould, deceased, as parties defendant in this action in the place and stead of George J. Gould, deceased, and reviving this action against said executors of the Estate of George J. Gould, deceased, pursuant to Chapter 253 of the Laws of 1925, and granting the cross-motion made by the executors of the Estate of George J. Gould, deceased, for an order vacating and setting aside the service of the order to show cause herein dated October 9, 1925, and vacating and setting aside said order to show cause.

Dated, New York, June 25, 1926.

Yours, etc.,

LOUIS MARSHALL,
Solicitor and Counsel for Petitioners,
No. 120 Broadway,
Borough of Manhattan,
New York City.

To:

Messrs. CHADBOURNE, STANCHFIELD & LEVY,
120 Broadway, New York City,

Messrs. GILLESPIE & O'CONNER,
20 Vesey Street, New York City,
Attorneys for Kingdon Gould and Schuyler Neilson Rice, as Executors of the Estate of George J. Gould, deceased, appearing specially and solely herein for the purpose of objecting to the jurisdiction of the Court over such Executors.

THE CLERK OF THE COUNTY OF NEW YORK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1926.

No.

HENRY W. MCMASTER and FRANCIS H. SKELDING, as Receivers of the Wabash Pittsburgh Terminal Railway Company,
Petitioners,

against

GEORGE J. GOULD; KINGDON GOULD and SCHUYLER NEILSON RICE, as Executors of the Estate of George J. Gould, deceased,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, NEW YORK COUNTY.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The above-named Henry W. McMaster and Francis H. Skelding, as Receivers of the Wabash Pittsburgh Terminal Railway Company, pray for a Writ of Certiorari to review the determination hereinafter described of the highest Courts of the State of New York having jurisdiction in the premises, and respectfully show:

I. This proceeding was commenced under Chapter 253 of the Laws of 1925 of the State of New York by the service of an order to show cause dated October 9, 1925,

granted by Mr. Justice Proskauer, one of the Justices of the Supreme Court of the State of New York. This order to show cause and the affidavits upon which it was granted were served, as directed in the order to show cause, by mail upon the executors of George J. Gould, deceased, to-wit: upon Kingdon Gould at 160 East 72nd Street, New York City; upon Schuyler Neilson Rice at 17 Adelaide Avenue, Highland Park, New Brunswick, New Jersey; upon both executors at the office maintained by them at 165 Broadway, New York City, and upon the attorneys of George J. Gould, deceased, who represented him in this action prior to his death, at their offices at No. 120 Broadway, New York City (*Rec., fols.* 87-94, 105-106, 126-127). The same attorneys who represented Mr. Gould upon the trial of this action, now appearing specially, are representing the executors in these proceedings.

II. The order of Mr. Justice Proskauer dated October 9, 1925, directed Kingdon Gould and Schuyler Neilson Rice, as executors of the Estate of George J. Gould, deceased, to show cause why an order should not be granted substituting them as such executors, and the Estate of George J. Gould, deceased, in his place and stead, and why they should not be brought in as defendants herein and why this action should not be revived against the said executors and the Estate of said George J. Gould, deceased (*Rec., fols.* 24-25).

III. On or about October 24, 1925, the executors of George J. Gould, deceased, appearing specially and solely for the purpose of the motion, served a cross-notice of motion asking that the service of the order to show cause dated October 9, 1925, be vacated and set aside on the grounds that the Court had no jurisdiction over the executors of the Estate of George J. Gould, deceased, or over any of the assets of the estate.

IV. After hearing, the Supreme Court of the County of New York, by resettled order dated November 2, 1925, entered in the office of the Clerk of the County of New York on November 16, 1925, denied the motion of petitioners to substitute the executors of George J. Gould, deceased, and to revive the action against them, and granted the motion of the executors of George J. Gould, deceased, and vacated and set aside the service of the order to show cause dated October 9, 1925,

> "upon the sole ground that Chapter 253 of the Laws of 1925, upon the authority of which this proceeding was brought, is unconstitutional and null and void in that the constitutional requirement of the 14th Amendment to the Constitution of the United States of due process of law precludes the legislature from providing generally for continuing actions for judgments *in personam* against foreign executors or administrators of deceased defendants" (*Rec., fols.* 18-19).

V. From this resettled order petitioners appealed to the Appellate Division of the Supreme Court, First Department, which Court affirmed the order of the Supreme Court, New York County, without opinion by order dated January 29, 1926. Petitioners then applied to the Appellate Division, First Department, for leave to appeal to the Court of Appeals, which was denied by order of said Appellate Division dated February 11, 1926. On February 23, 1926, petitioners appealed to the Court of Appeals from the order of the Appellate Division of the Supreme Court, First Department, which affirmed the resettled order of the Supreme Court, New York County, entered in the office of the Clerk of the County of New York on November 16, 1925. The Court of Appeals dismissed the appeal on May 14, 1926, and an order was accordingly entered upon the remittitur of the Court of Appeals in the office of the Clerk of the County of New York on May 28, 1926, where the record in these proceedings is now lodged.

VI. The material facts with respect to the case are as follows:

The petitioners brought an action in the Supreme Court of New York on September 26, 1910, against George J. Gould and others, as managers and trustees of the Pittsburgh and Toledo Syndicate, for an accounting of funds received by them for the use of the Wabash Pittsburgh Terminal Railway Company, a large part of which the petitioners claimed was not devoted to the use for which they were intended (*Rec., fols.* 94b-95m). The defendant Gould appeared in the action and interposed an answer (*Rec., fol.* 96yy). In due time the issues were tried at Special Term before Mr. Justice Finch. A great mass of testimony and exhibits was introduced in evidence by the respective parties (*Rec., fols.* 33-36, 64-65). Gould was sworn as a witness on his own behalf at considerable length and was interrogated in regard to all of the matters in issue (*Rec., fols.* 36, 72).

The taking of the testimony was completed with the exception of that of one witness whom the defendants expressed their intention of calling and who was prevented from testifying at the trial because of his illness. This led to a postponement at the defendants' instance. The taking of the testimony of this witness was delayed by defendants' counsel, and before the case could be finally submitted, Mr. Justice Finch was assigned to the Appellate Division of the Supreme Court. This automatically disqualified him from taking further action in the case and a mistrial resulted (*Rec., fols.* 65-66).

Several attempts were made to retry the case before another Justice, but, owing to the illness of defendants' trial counsel, further postponements were necessitated (*Rec., fol.* 66).

On May 16, 1923, the defendant George J. Gould died, he being at that time a resident of New Jersey (*Rec., fol.* 35). On June 4, 1923, his last will and testament was admitted to probate in Ocean County, New Jersey, and letters testamentary were issued to his son, Kingdon Gould, and to Schuyler Neilson Rice (*Rec., fols.* 35-36).

The testator had for thirty-five years maintained offices in the City of New York, where he transacted business in person (*Rec., fols.* 74-75). He also occupied a house in that city with his family. He was connected in an official capacity with important corporations which had their offices and principal places of business in New York (*Rec., fol.* 77).

Kingdon Gould has a residence at No. 160 East 72nd Street, in the City of New York, but claims that his legal residence is in New Jersey. Mr. Rice resides in New Jersey. The executors now occupy the offices formerly occupied by their testator at 165 Broadway, New York City (*Rec., fols.* 79-81).

The only surviving defendant in this action is Myron T. Herrick, who is a resident of Ohio. None of the other defendants named in the complaint was ever served with process in the action, one of them, Mr. Ramsay, being at the time of his death a resident of Pennsylvania and the other, Mr. Hyde, residing in France (*Rec., fol.* 82).

Upon the death of Gould, the petitioners sought to revive the action and to make his executors defendants in his stead. They were met by the claim that the action could not be thus revived and that Section 160 of the Decedents' Estate Law of New York did not authorize such proceedings. The Appellate Division of the First Department so held and the Court of Appeals, to which the question arising under that section of the statute was certified, affirmed.

The question so certified was as follows:

> "*Did the Court at Special Term have power* to substitute the executors of the last will and testament of George J. Gould, deceased, appointed by the Orphans' Court of New Jersey, where his will was probated, as parties defendant herein without their consent, in place of their testator, pursuant to the proceedings instituted by the plaintiffs herein for that purpose, and to revive as against the executors this action, which at the time of testator's

death was pending in the Supreme Court of this State?"

It was then that Chapter 253 of the New York Laws of 1925 was enacted on April 1, 1925. By its terms a new subdivision was added to Section 160 of the Decedents' Estate Law, reading as follows (*Rec., fols.* 43-45):

> "2. *An action or proceeding pending in any court of this state in which the court shall have obtained jurisdiction of the person of a defendant or respondent who is domiciled in any other state, territory or district of the United States or in any foreign country shall, if the cause of action survives, not abate by reason of the death of such defendant or respondent, but his executor or administrator duly appointed in such state, territory or district of the United States or foreign country, shall, upon the application of the adverse party, and upon such notice as the court may prescribe, be brought in and substituted in the place of the decedent and the action or proceeding shall continue.*
>
> Sec. 2. This act shall take effect immediately."

A motion for reargument was then made on the strength of this statute, and a reargument having taken place, the Court adhered to its order upon the ground that it could only review the question so certified, and no other, and that the newly enacted statute had not been, as it could not have been, considered by the Appellate Division, because it was not enacted until after the certificate had been made (240 N. Y. 379).

The motion which resulted in the determination now under review, was then made on the sole basis of this amendment, at a Special Term of the Supreme Court, to revive the action and to substitute the executors of George J. Gould as defendants in place of the testator. This motion was denied "on the sole ground that the statute on the authority of which the proceeding was brought was unconstitutional in that the requirement of the Fourteenth Amendment to the Constitution of the United States of due process of law precluded the Legislature from providing for the continuance of actions for judgment *in*

personam against foreign executors or administrators of deceased defendants" (*Rec., fols.* 18-19).

The Appellate Division of the Supreme Court of the First Department, to which an appeal was taken from this decision, affirmed the order without opinion (*Rec., fols.* 226-230, 246). The petitioners subsequently applied for leave to appeal to the Court of Appeals, which application was denied (*Rec., fols.* 232-236). The petitioners nevertheless, out of abundance of caution, even though it was questionable whether the Civil Practice Act permitted a review in the absence of such leave, appealed to that Court from the order of affirmance, where a decision dismissing the appeal, without opinion, was rendered on May 14, 1926, and on May 28, 1926, an order conforming with the remittitur of the Court of Appeals was entered in the office of the Clerk of New York County (242 N. Y. Memo. 110).

VII. Petitioners are advised by their counsel and believe that this case is one wherein the New York Supreme Court has decided a question arising under the Constitution of the United States in direct contravention to Section 1 of the Fourteenth Amendment to the Constitution of the United States, by adjudging that subdivision 2 of Section 160 of the Decedents' Estate Law of the State of New York, as added by the amendment of that section by Chapter 253 of the Laws of New York of 1925, denies to the defendants due process of law. Petitioners contend, for the reasons set forth in their annexed brief, which is hereby made a part hereof, that the conclusion reached is erroneous and that the statute thus adjudged to contravene the Fourteenth Amendment is constitutional and valid.

VIII. Petitioners now seek to review the determination by which subdivision 2 of Section 1 of Chapter 253 of the New York Laws of 1925 has been declared to violate the "due process clause" of the Fourteenth Amendment, that being the sole ground on which a denial of the motion for the substitution of the executors of George J. Gould as defendants and for the revival of the action as against

them has been adjudged. The constitutional question thus presented is regarded as of the first importance. It is one which under present conditions is likely to be of frequent recurrence. That is especially true in the States where large business transactions are conducted by residents of other States, out of which litigation arises in the States where the business is transacted, against such non-residents. Death of such defendants occurring pending the litigation, their property is in many instances administered in the States of their residence. If the decision now under consideration were to stand, the jurisdiction of State Courts acquired by due process could easily be evaded and grave injustice would result.

IX. A transcript of the record of the case, including the proceedings of the Court of Appeals and the Appellate Division of the Supreme Court, First Department, of the State of New York, accompanies this petition.

WHEREFORE, your petitioners pray that a Writ of Certiorari may issue out of and under the seal of this Court directed to the Supreme Court of the State of New York, New York County, commanding said Court to certify the case to this Court for review and determination, as provided in the Act of Congress known as the Judicial Code, and that your petitioners may have such other and further relief in the premises as to the Court may seem appropriate and in conformity with said Act.

And your petitioners will ever pray.

HENRY W. McMASTER,
FRANCIS SKELDING,
by LOUIS MARSHALL,
their Solicitor and Counsel,
as Receivers of the Wabash Pittsburgh
Terminal Railway Company.

LOUIS MARSHALL,
Solicitor and Counsel for Petitioners,
120 Broadway, New York City.

UNITED STATES OF AMERICA,
SOUTHERN DISTRICT OF NEW YORK, } ss.:

LOUIS MARSHALL, being duly sworn, says that he is the solicitor and counsel herein of the petitioners named in the foregoing petition; that he has read the same and knows the contents thereof; that the facts as stated are true to the best of his knowledge, information and belief.

LOUIS MARSHALL.

Subscribed and sworn to before me
this 25th day of June, 1926.

RAPHAEL BRILL

~~EDWARD M. NEARY,~~
Notary Public,
New York County, N. Y.

CERTIFICATE OF COUNSEL.

I HEREBY CERTIFY that in my opinion the foregoing petition for a Writ of Certiorari is well founded in law.

LOUIS MARSHALL,
Solicitor and Counsel for Petitioners

Supreme Court of the United States

OCTOBER TERM, 1926.

No.

HENRY W. MCMASTER and FRANCIS H. SKELDING, as Receivers of the Wabash Pittsburgh Terminal Railway Company, Petitioners, against GEORGE J. GOULD; KINGDON GOULD and SCHUYLER NEILSON RICE, as Executors of the Estate of George J. Gould, deceased.	On Petition for Writ of Certiorari.

PETITIONERS' POINTS.

The facts out of which this controversy has arisen and to which the constitutional question which is about to be discussed relates, are sufficiently set forth in paragraph VI of the annexed petition.

POINTS.

I.

Chapter 253 of the Laws of 1925 does not infringe any provision of the Federal Constitution. It does not deprive the New Jersey executors of George J. Gould of due process of law within the meaning of the Fourteenth Amendment.

(1) *The action instituted against George J. Gould to require him to account as a trustee and as one of the man-*

agers of the Pittsburgh and Toledo syndicate survived upon his death and is enforceable against his personal representatives.

Hazard v. *Durant,* 19 Fed. Rep. 417.
Allen v. *Luke,* 163 Fed. Rep. 1018.
Dodd v. *Wilkinson,* 41 N. J. Eq. 566.
O'Brien v. *Blaut,* 17 App. Div. 288.
Pierson v. *Morgan,* 52 Hun 611; 17 Civ. Pro. Rep. 124; aff'd 121 N. Y. 705.
Wineburgh v. *United States R. R. Adv. Co.,* 173 Mass. 60.
Lovejoy v. *Bailey,* 214 Mass. 134.
Harrigan v. *Gilchrist,* 121 Wis. 127.
Section 82, New York Civil Practice Act.

(2) *Since the cause of action against Gould survived and did not abate in consequence of his death, the petitioners were entitled to revive the action against his personal representatives, unless the fact of his residence in New Jersey and the administration of his estate there prevents such revival.*

As long ago as in *McKnight* v. *Craig,* 6 Cranch. 187, Chief Justice Marshall, in a proceeding by *scire facias* to revive an action against the personal representatives of a deceased defendant, said *"that it is not to be considered as a proceeding against the representatives of the deceased, but a continuance of the original action,"* and that therefore a plea which could not have been set up in the original action was regarded as bad.

In *Clarke* v. *Mathewson,* 12 Pet. 163, a bill was filed by Wetmore, a citizen of Connecticut, against Mathewson and others, citizens of Rhode Island, in the United States Circuit Court for the District of Rhode Island. An answer was interposed and the cause was referred to a master for an accounting. Pending these proceedings the complainant died. Administration of his effects was granted

to Clarke, who filed a bill of revivor in the Circuit Court. The laws of Rhode Island did not permit one residing out of the State to take out administration of a deceased person within the State, and made such administration indispensable to the prosecution and defense of any suit in the State in the right of the estate of the deceased. It was held that the bill of revivor was in no just sense an original suit; that the parties to the original suit were citizens of different States and the jurisdiction of the Court completely attached to the controversy, and having so attached, it could not be divested by any subsequent proceedings. Mr. Justice Story, in the course of his opinion, said:

> "The death of either party, pending the suit, does not, where the cause of action survives, amount to a determination of the suit. It might, in suits at common law, upon the mere principles of that law, have produced an abatement of the suit, which would have destroyed it. But in courts of equity, an abatement of the suit, by the death of a party, has always been held to have a very different effect; for such abatement amounts to a mere suspension, and not to a determination, of the suit. It may again be put in motion, by a bill of revivor, and the proceedings being revived, the cause proceeds to its regular determination, as an original bill. *The bill of revivor is not the commencement of a new suit; but is the mere continuation of the old suit.*"

This principle was recognized in the Judiciary Article in 1789. Section 955 of the United States Revised Statutes is a re-enactment of the original provision. This constitutes a persuasive practical interpretation of the Constitution by men who took a leading part in the framing and adoption of the first ten Amendments to the Constitution. It provides:

> "When either of the parties, whether plaintiff or petitioner, or defendant, in any suit in any court of the United States, dies before final judgment, the executor or administrator of such deceased party may, in case the cause of action survives by law,

prosecute or defend any such action to final judgment. The defendant shall answer accordingly; and the Court shall hear and determine the cause and render judgment for or against the executor or administrator as the case may require. And if such executor or administrator, having been duly served with a *scire facias* from the office of the clerk of the court where the suit is depending, twenty days beforehand, neglects or refuses to become party to the suit, the Court may render judgment against the estate of the deceased party, in the same manner as if the executor or administrator had voluntarily made himself a party. The executor or administrator who becomes a party as aforesaid, shall upon motion to the Court, be entitled to a continuance of the suit until the next term of said court."

The amendment of this section by Joint Resolution of December 22, 1921 (Fed. Stat. Ann., 1921 Supp., p. 236), is significant.

(3) *A proceeding to revive an action against a deceased defendant and to bring in his executors, is not the commencement of a new action, but merely the continuance of one actually pending at the time of death. Such a proceeding constitutes due process, although the persons sought to be brought in are non-residents of the State in which the action is pending.*

In this case, George J. Gould was properly brought before the Supreme Court of New York. It had jurisdiction not only over his person, but also over the subject-matter. His death did not oust it of jurisdiction, for the cause of action survived. Action was merely suspended until his executors could be brought before the Court. At the time of his death the New Jersey Statute of Limitations would have barred an action or proceeding in the courts of that State against him (*Rec., fols.* 94xx-94yy).

If, under the circumstances, the Courts of New York are precluded by the Fourteenth Amendment from proceeding with this action because the testator at the time

of his death was domiciled in New Jersey, where his will was probated and his executors reside, then the petitioners will have been deprived of all remedy on a meritorious cause of action which survives but cannot under the circumstances be revived and continued against the testator's executors. That would be most unjust and unreasonable.

The situation here is very similar to that considered in *Nations* v. *Johnson*, 24 How. 195. There an action had been brought in the Chancery Court of Mississippi and a judgment was rendered from which an appeal was taken to the Court of Errors and Appeals of the State. The defendant-in-error was a non-resident and had no attorney of record in the State. These facts being brought to the attention of the appellate court, an order was made to the effect that unless the defendant-in-error appeared at a time stated, the Court would proceed to hear and determine the cause in the same manner as if process had actually been served, and the publication of a copy of the order in a specified public newspaper was directed. That having been done, the Court proceeded to reverse the decree of the court of first instance. The validity of that judgment was subsequently called into question, and was sustained, Mr. Justice Clifford saying:

> "Personal service was made upon the defendants in this case by due process of law in the court of original jurisdiction, and the question here is, whether a party duly served with notice in a subordinate court, after he has appeared and answered in the suit, and secured an erroneous judgment in his favor, may voluntarily absent himself from the jurisdiction of the appellate tribunal, so as to render it impossible to give him personal notice of an appeal, and still have a right to complain that notice was served by publication, pursuant to the law of the jurisdiction from which he has thus voluntarily withdrawn. We think not. To admit the proposition would be to deprive the other party of all means of removing the cause to the appellate tribunal, and would enable a party, who knew he had wrongfully prevailed in the court below, to secure the fruits of

> an erroneous judgment, by defeating the jurisdiction of the appellate court. Actual notice ought to be given in all cases where it is practicable, even in appellate tribunals; but whenever personal service has been rendered impossible by the removal of the appellee or defendant in error from the jurisdiction, service by publication is sufficient to give the appellate tribunal jurisdiction of the subject and the person, provided it appears in the record that personal service was given in the subordinate court, and that the party there appeared, and litigated the merits of the controversy. * * * *Plainly, therefore, there is a distinction between a writ of error and the original suit. According to the practice in this court, it is rather a continuation of the original litigation than the commencement of a new action;* and such, it is believed, is the general understanding of the legal profession in the United States. *Cohens* v. *Virginia,* 6 Wheaton, 410; *Clarke* v. *Mathewson,* 12 Pet. 170."

This decision was cited with approval in *Pennoyer* v. *Neff,* 95 U. S. 735, and was followed in *Michigan Trust Co.* v. *Ferry,* 228 U. S. 353.

In the former of these cases, Mr. Justice Field said:

> "It is hardly necessary to observe, *that in all we have said we have had reference to proceedings in courts of first instance,* and to their jurisdiction, and not to proceedings in an appellate tribunal to review the action of such courts. The latter may be taken upon such notice, personal or constructice, as the State creating the tribunal may provide. *They are considered as rather a continuation of the original litigation than the commencement of a new action. Nations et al.* v. *Johnson et al.,* 24 How. 195."

It is difficult to differentiate the taking of an appeal in a pending action, from a proceeding to revive a nonabatable action after the death of a defendant, who personally appeared therein and had his day in court and

actually litigated as to the subject-matter of the action. *In both cases there is a mere continuation of the original litigation and not the commencement of a new action. Chapter 253 of the Laws of 1925 proceeds on that theory.*

In the second case (228 U. S. 353), William M. Ferry died, domiciled in Michigan, in 1867. His will was proved and the defendant, Edward P. Ferry, was appointed executor by the Probate Court of Ottawa County, Michigan, and qualified and entered upon his duties. In 1878 he removed to Utah, and becoming incompetent, was, in 1892, put under the guardianship of two sons. In 1903 residuary legatees and devisees petitioned the Michigan Probate Court that the defendant be removed from his office of executor, that he be ordered to account for the unadministered residue of the estate and that the Michigan Trust Company be appointed administrator *de bonis non* with the will annexed. Notice of the petition and of the time and place of the hearing was given by publication and also was given to the defendant and his guardians personally in Utah. Judgment was rendered against the defendant and its validity became the subject of consideration before this Court, where Mr. Justice Holmes said that "if a judicial proceeding is begun with jurisdiction over the person of the party concerned *it is within the power of the State to bind him by every subsequent order in the cause.*"

Kindred in character with the case now before the Court are the following decisions:

Peaslee v. *Peaslee,* 147 Mass. 179 (opinion by Mr. Justice Holmes).

White v. *White,* 65 N. J. Eq. 747 (opinion by Mr. Justice Pitney, late a member of this Court).

Elsasser v. *Haines,* 52 N. J. Law 19.

Fitzsimmons v. *Johnson,* 90 Tenn. 428 (in which decision Mr. Justice Lurton, late a member of this Court, participated).

In all of these cases *Nations* v. *Johnson* was followed.

See also:

Logan v. *Greenwich Insurance Co.*, 144 App. Div. 372; aff'd 203 N. Y. 611.

The proceeding for the revival of this action possesses all of the elements of the cases just referred to. The New York Supreme Court having obtained jurisdiction over George J. Gould, it was within the competency of the Legislature on his death to enable that Court to bring before it his executors, even though they could not have been made parties defendant had this been an original suit.

Hence, for all purposes of due process of law, the New York Supreme Court acquired the power to continue this action, which has long been awaiting decision and which was strenuously litigated in the tribunals of that State by the testator of Kingdon Gould and Schuyler Neilson Rice, who, under his last will and testament, have been made the custodians of his property and have been directed by him as to its disposition and management. What is now sought to be accomplished in no essential respects differs from that which was regarded as a legitimate exercise of legal process as against non-residents in *Nations* v. *Johnson* and *Michigan Trust Co.* v. *Ferry*, where the proceedings instituted were in the nature of a continuation of actions brought and litigated in jurisdictions other than those wherein the persons proceeded against resided and upon whom process could not be served in the State where the actions were pending.

When the Court in this case acquired jurisdiction over George J. Gould for the purposes of this action, such jurisdiction was not limited but was sufficiently broad to enable the Court, exercising the powers conferred upon it by the Legislature, to do whatever was necessary in the course of the litigation to render an effective judgment. The death of George J. Gould did not create a bar against the exercise of such power; nor did the unwillingness of

his executors to consent to a continuance of the litigation so operate.

It is believed that, regardless of all other reasons, this element distinguishes the present case from those relied upon by the executors.

(4) *The provision added to Section 160 of the Decedents' Estate Law by Chapter 253 of the Laws of 1925, in unmistakable terms deals with the precise situation existing in this case. The constitutionality thereof properly came up for determination in the proceedings now sought to be reviewed and was determined adversely to the petitioners in the highest Courts of New York having jurisdiction in the premises.*

> *Campbell* v. *Holt,* 115 U. S. 620.
> *Robinson* v. *Robins Dry Dock & Repair Co.,* 238 N. Y. 271.
> *Danforth* v. *Croton Water Co.,* 178 Mass. 472.
> *Dunbar* v. *Boston & Providence R. R. Corp.,* 181 Mass. 383.

When this case was before the Court of Appeals in the prior proceeding (*McMaster* v. *Gould,* 240 N. Y. 379), the only question presented was whether, under Section 160 of the Decedents' Estate Law, as it stood at the time when the Appellate Division made its certificate pursuant to the New York procedure, the action could be revived against Gould's executors. The question certified was:

> "Did the Court at Special Term have power to substitute the executors of the last Will and Testament of George J. Gould, deceased, appointed by the Orphans' Court of New Jersey, where his will was probated, as parties defendant herein without their consent, in place of their testator, pursuant to the proceedings instituted by the plaintiffs herein for that purpose, and to revive as against the executors this action, which at the time of testator's death was pending in the Supreme Court of this State?"

The Court of Appeals held that it could review the question certified, *and no other, that the effect of the newly enacted statute* (Chap. 253 of the Laws of 1925) *had not been discussed or considered by the Appellate Division, was a new question presented for the first time in the Court of Appeals, and that the Court could not, therefore, consistently answer the question in the affirmative even though the constitutionality of the statute were upheld.* "If the court below was right when it certified the question, it is still right," said Judge Pound, speaking for the Court (*McMaster* v. *Gould*, 240 N. Y. 384, 385).

While it is true that the Court, after having thus disposed of the case on the ground stated, indicated that in its opinion the act was unconstitutional, yet that did not preclude the institution of a new proceeding under the statute for the purpose of preparing the way for an adjudication by this tribunal, as to the validity of the statute, in the only way possible.

The decision by the Court of Appeals last referred to could not have been reviewed here because primarily based on the procedural ground just mentioned, which would have precluded a consideration by this Court of the constitutional question.

The opinion of the Court of Appeals in 240 N. Y. 379, received adverse comment from the editors of the Yale Law Journal (Jan., 1926, p. 371), as follows:

> "In the final analysis 'due process' appears to be no more than 'reasonableness.' *Comments* (1925), 34 *Yale Law Journal*, 886. The statute in question seems to fulfill this requirement, for one of the most important functions of the probate courts is to settle all just claims against a decedent. 3 Schouler, *Wills, Executors and Administrators* (6th ed., 1923), Sec. 1391. And although the original conception of jurisdiction, as the authority of the sovereign over territory in which the defendant is found, is still the standard test, there is to-day a growing acknowledgment that fair notice, when in conjunction with the operative facts giving rise to a

cause of action, is the better test. *Comments* (1925), 34 *Yale Law Journal,* 415. So it would seem that a contrary and more desirable result could have been reached in the instant case, unless the court is justified in its assumption that the ancient rule that the decedent's representative has no legal existence in another state because merely the statutory creature of the state of his appointment, can have no exception. But the very fact that the law of wills, executors and administrators was created and is governed by statute, should be sufficient reason to validate any reasonable changes in it which the legislature might care to make. And the ancient rule actually has many exceptions to-day. Thus an action *in rem* to foreclose a lien may be maintained against a foreign executor. *Holmes* v. *Camp* (1916), 219 N. Y. 359, 114 N. E. 841. Where a legatee sued the executor and other legatees to obtain a distribution of the estate, the foreign executor of a deceased non-resident legatee, being a necessary party, was joined as defendant. *Stone* v. *Demarest* (1902, 1st Dept.), 67 App. Div. 549, 73 N. Y. Supp. 903. An administrator appointed in one state may be sued in another for a debt owed by the intestate. *Evans* v. *Tatem* (1823, Pa.), 9 Serg. & R. 252; *contra: Fay* v. *Haven* (1841, Mass.), 3 Metc. 109 [on ground that it was not equitable to permit foreign representative to be sued when he could not himself sue. But New York by statute permits him to sue. 3 Bliss, N. Y., *Annotated Code* (6th ed., 1913), sec. 1836 (a)]. Where jurisdiction was obtained by service of summons within the state on a foreign executor who died thereafter, the action was continued against the foreign administrator with the will annexed, without further service. *Thorburn* v. *Mitchell* (1920, 1st Dept.), 193 App. Div. 174, 183 N. Y. Supp. 424. Moreover, in the instant case, there would seem to be sufficient privity between the decedent and his executor to constitute the entire matter but a single code cause of action. *Latine* v. *Clements* (1847), 3 Ga. 426; see Clarke, *The Code Cause of Action* (1924), 33 *Yale Law Journal,* 817. Under the instant decision, due to the courts' clinging to the narrow, territorial notion of jurisdiction which seems out of harmony

> with the ever increasing interstate activity of today, the plaintiff is forced to the delay and expense of reinstituting his action in another state."

(5) *Regardless of what might be the rule in the case of the revival of an action under these circumstances against administrators appointed in a foreign jurisdiction, there is a distinct differentiation in the case of executors of a will probated in a foreign jurisdiction.*

In *McMaster* v. *Gould* (240 N. Y. 379), Judge Pound recognized this distinction, as did Judge Cardozo in *Helme* v. *Buckelew,* 229 N. Y. 363. In the latter case Judge Cardozo said (p. 366), quoting from *Hill* v. *Tucker,* 13 How. 458, 466:

> "The executor's interest in the testator's estate is what the testator gives him. That of an administrator is only that which the law of his appointment enjoins."

Further on he says (pp. 366-367):

> "Executors, however, were held to occupy a position which had some elements of difference. Like administrators, they were not subject to suit in another jurisdiction until letters were granted to them. Apparently the reason for this was that the courts of another jurisdiction were not *bound* to recognize their authority. If, however, their authority *was* recognized, as where they took out ancillary letters, a judgment obtained in one jurisdiction was not void of all effect when put in evidence in another. * * * Executors, unlike administrators, stood in privity with each other." (Italics those of the Court.)

Continuing, Judge Cardozo said (p. 367):

> "These were the general rules as they stood before the statute.* They were not, however, without

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* This refers to Section 1836a of the Code of Civil Procedure, which is practically the same as subdivision 1 of Section 160 of the Decedents' Estate Law as it stood prior to the enactment of Chapter 253 of the Laws of 1925.

> exceptions. According to some decisions, an executor or administrator might submit to the jurisdiction of the foreign courts, and the judgment would then bind him everywhere (*Lawrence* v. *Nelson*, 143 U. S. 215, 222; *Chicago Life Ins. Co.* v. *Cherry*, 244 U. S. 25, 29; *Newark Savings Inst.* v. *Jones*, 35 N. J. Eq. 406; *Babbitt* v. *Fidelity Trust Co.*, 70 id. 655). But even without waiver of immunity, a court of equity took jurisdiction at times over foreign representatives when it was necessary to intervene for the administration of local assets."

We pause here to point out that what we are seeking to do in the present case is to revive an action properly brought in the Courts of New York against the testator, not to institute an original action against his executors. The statute permits the court called upon to intervene for the necessary purpose of effectuating its existing jurisdiction over the subject-matter of the action and over the person of the testator. We are not dealing with an administrator who is an officer of a foreign sovereignty, but with executors whose interest in the testator's estate was acquired directly from him.

In *McMaster* v. *Gould*, on reargument, Judge Pound said (p. 386):

> "The will is the source of the executor's power and letters testamentary are evidence of his authority, but the rights and liabilities of both executors and administrators in respect to the fund in their hands are like those of trustees. The wide distinction between the nature of the title of executors and administrators had disappeared but this essential difference as to the source of title remains: the foreign administrator exists only by virtue of the statute of another State; the executor's authority springs from the will and not from the letters testamentary."

Here, again, the Court failed to observe that the amendment of 1925 does not relate to the commencement of a

new action, but is confined to the revival of an action actually pending in the courts of New York against a defendant of whom those courts had obtained jurisdiction, and which the statute permits them to continue for the rendition of judgment against the foreign executors of the deceased defendant.

It has been well said that an executor named by a testator in his will and the testator are *eadem persona* (*Matter of Martin,* 82 Misc. Rep., N. Y., 589). It is, therefore, no more doing violence to justice in a case like the present for the court of New York, under the sanction of its Legislature, to bring into litigation pending before such court the executor of a deceased defendant domiciled in another State, than it was for this Court to sustain similar procedure in the interest of justice in *Nations* v. *Johnson,* 24 How. 195, and in *Michigan Trust Co.* v. *Ferry,* 228 U. S. 353.

In *Hill* v. *Tucker,* 13 How. 458, 466, Mr. Justice Wayne, speaking of the relations or privity between executors and testators, said:

> "Louisiana, in her code, without adopting the terms of the civil law, makes the same distinction as is made at common law, between one called upon to administer the estate of an intestate, and one appointed to the office of executor by a testator. The responsibilities of both, as to the manner of settling the estate which they represent, depend upon the law of the State; but the relation between executor and testator is altogether different. The executor's interest in the testator's estate is what the testator gives him. That of an administrator is only that which the law of his appointment enjoins. * * * But though the executor's trust or appointment may be limited, although there are several executors in different jurisdictions, and some of them limited executors, they are, as to the creditors of the testators, executors in privity, bearing to the creditors the same responsibilities as if there was only one executor. The privity arises from their obligations to pay the testator's

> debts, wherever his effects may be, just as his obligation was to pay them. The executor's interest in the testator's estate is derived from the will, and vests from the latter's death, whatever may be the form which the law requires to be observed before an executor enters upon the discharge of his functions. * * * Between administrators deriving their commissions to act from different political jurisdictions, there is no such privity."

In *Fidelity & Casualty Co.* v. *Freeman,* 109 Fed. Rep. 847, the Court, consisting of Circuit Judges Lurton, Day and Severens, said:

> "The executor derived his authority from the will. He was not an officer of the court, but was regarded as a trustee for the purposes declared by the testator, and could, before probate, do nearly all things required for the settlement of the estate except that he could not bring suits in the courts. The probate was for the purpose of definitely determining his character, and establishing it once for all, and enabling him to make profert of his authority in the manner required by the practice of the courts. Ordinary administration was in derogation of his rights as executor, which could not be thus taken away. And it was at one time held that such an administration was void upon the subsequent production and probate of the will."

In *Hartnett* v. *Wandell,* 60 N. Y. 346, 350, Judge Allen said:

> "It is true that by the statutes of this State, executors are not permitted to exercise their powers except to a very limited extent, until proof of the will and the granting of letters testamentary. But this does not affect the character of the office or detract from the efficacy of the will as the source of the power. An executor derives power from the will, but an administrator owes his to the appointment of the surrogate. (Lovelass on Wills, 382, et seq.) An executor can derive his office from a testamentary appointment only."

In *Matter of Bergdorf,* 206 N. Y. 312, Judge Collin said:

> "The title and general powers of an executor have their source in the will under which the executorship exists. Within the regulations and restrictions prescribed by law, a testator may commit the custody and administration of his estate to such executor or executors as he pleases, and his selection and designation alone it is which invests them with authority and power. The letters testamentary, founded upon the probate of the will, neither create the executor nor confer title or power upon him. They are the authentic evidence that the will has been duly proven; that the testator competently and in fact made the selection and designation of the executor, and that permission has been given the executor, by the court having jurisdiction, to exercise the powers conferred by the testator through the will."

(6) *Independently of this statute and of permissive legislation, it has been decided that actions may be maintained in the Courts of New York against foreign executors where it is necessary to prevent a failure of justice. That fact emphasizes the contention that Chapter 253 of the Laws of 1925 does not violate the due process clause.*

> *McNamara* v. *Dwyer,* 7 Paige 239, 241.
> *Colbert* v. *Daniel,* 32 Ala. 314.
> *Bergmann* v. *Lord,* 194 N. Y. 70.
> *Montgomery* v. *Boyd,* 78 App. Div. 64.
> *Holmes* v. *Camp,* 219 N. Y. 359.
> *Gould* v. *Gould,* 122 Misc. Rep. 152.

If there ever was a case where there would be a failure of justice if jurisdiction were not exercised by courts over a foreign executor, it is now presented. Here, the litigation had been proceeding in the courts of New York for nearly fourteen years. George J. Gould appeared and took an active part in it. He testified at great length in his own behalf. He was represented by able counsel. Although he may have been a citizen of New Jersey, he

also maintained a residence in New York, where he had his office and transacted business national in its scope (*Rec., fols.* 72-77). At the time of his death the case was practically ripe for judgment, but, because of the promotion to the Appellate Division of Mr. Justice Finch, before whom the case was in course of trial, he became disqualified from pronouncing judgment and a mistrial resulted (*Rec., fol.* 65).

It was claimed on behalf of George J. Gould that at the time that the action was commenced, the cause of action against him had been barred under the laws of New Jersey, and now it is suggested on the part of the executors that the petitioners are to be relegated to the courts of that State for the enforcement of any cause of action that they may have had against the testator, with the consequence that even if this contention as to the operation of the Statute of Limitations of New Jersey at the time of the commencement of this action was unsound, it is beyond all question that the petitioners would now be debarred of a remedy in the courts of New Jersey (*Rec., fols.* 94xx-97yy). It is not believed that where a cause of action is of such a nature as to survive the death of the person against whom it lies, it may nevertheless be destroyed by his death during the pendency of the action, because subsequent to the bringing of the action the cause of action has become barred by the Statute of Limitations of the State where the decedent's will was probated and his executors qualified. Such a result would be a reproach to any system of laws, because it would bring about an utter failure of justice, solely in consequence of the application of a highly technical and artificial rule of procedure.

The defendant Herrick is a resident of the State of Ohio. He pleaded the Ohio Statute of Limitations (*Rec., fols.* 94zz-96zz). If the executors' contentions were correct, upon the death of Herrick the action as to him would likewise abate in New York and his executors could only

be proceeded against in Ohio. We would, therefore, have the astounding result that, after the death of the defendants, an action properly commenced in New York and over which the New York courts had lawfully obtained jurisdiction, would have to be split into two actions and begun anew in two foreign jurisdictions, in both of which actions the defendants would assert the bar of the Statutes of Limitations of those jurisdictions, because of the lapse of time running during the pendency of the action properly brought in New York. It would, in effect, amount to a state of anarchy were the courts impotent, in spite of legislative authority, to assert the power under conditions here presented to proceed to judgment against the executors of deceased defendants.

Doubtless the Legislature, recognizing that New York was one of the great commercial centres of the world, to which men of affairs residing in every part of the United States resort, where they enter into important contracts and incur obligations of vast amounts, and where they frequently engage in litigation over which the courts of New York acquire and exercise jurisdiction by due process of law, enacted this statute for the purpose of dealing with just such a situation as exists in the present case.

The provisions of this Act are reasonable. They fully safeguard the interests of the testator and of his personal representatives. They merely permit to be continued an action over which the courts of the State had acquired full jurisdiction. To declare such legislation to be a deprivation of due process of law is to disregard modern conditions. The executors are not deprived of their day in court. It is accorded to them. They are merely brought before a judicial tribunal for the purpose of enabling it to continue a proceeding which was in process of being adjudicated in perfect conformity with due process of law. To declare such a statute unconstitutional as wanting in due process, is to distort that time-honored phrase from its true significance. It would pervert the most fundamental principles of justice into weapons of injustice.

(7) *Chapter 660 of the Laws of 1926, which undertook to repeal Section 160 of the Decedents' Estate Law, does not affect the proceedings at that time pending under subdivision 2 of Chapter 253 of the Laws of 1925.*

The so-called repealing act was passed on April 29, 1926, a few days before the argument in the Court of Appeals. It contained no provision which in any way affected pending proceedings. It reads as follows:

> "Section one hundred and sixty of chapter eighteen of the laws of nineteen hundred and nine, entitled 'An act relating to the estates of deceased persons, constituting chapter thirteen of the consolidated laws,' as added by chapter nine hundred and nineteen of the laws of nineteen hundred and twenty, and last amended by chapter six hundred and three of the laws of nineteen hundred and twenty-five, is hereby repealed."

It made no specific reference to Chapter 253 of the Laws of 1925, with which we are now concerned. It in no way expressed the purpose of being applicable to proceedings then pending under Section 160 of the Decedents' Estate Law. That statute was one of the Consolidated Laws of the State of New York, consisting of many chapters, wherein the general statutes of the State were arranged in classified order. One of these statutes was the General Construction Law, which is Chapter 22 of the Consolidated Laws. It applied to all future legislation and laid down rules of construction applicable to all of the general legislation of the State. Two of its provisions, constantly invoked and applied, demonstrate that the repealing act of 1926 has no bearing upon proceedings pending at the time of its enactment. These provisions are Sections 93 and 94 of the General Construction Law. They read:

> "SEC. 93. *Effect of repealing statute upon existing rights.* The repeal of a statute or part thereof shall not affect or impair any act done, offense committed or right accruing, accrued or acquired, or lia-

bility, penalty, forfeiture or punishment incurred, prior to the time such repeal takes effect, but the same may be enjoyed, asserted, enforced, prosecuted or inflicted as fully and as to the same extent as if such repeal had not been effected.

SEC. 94. *Effect of repealing statute upon pending actions and proceedings.* Unless otherwise specially provided by law, all actions and proceedings, civil or criminal, commenced under or by virtue of any provision of the statute so repealed and pending immediately prior to the taking effect of such repeal, may be prosecuted and defended to final effect in the same manner as they might if such provisions were not so repealed."

Among the many cases in which these rules have been applied by the New York Court of Appeals are:

Cameron v. *N. Y. & M. O. W. Co.*, 133 N. Y. 336.
Close v. *Noye*, 147 N. Y. 597.
People v. *N. Y. C. & H. R. R. R. Co.*, 156 N. Y. 570.
Geneva R. R. Co. v. *N. Y. C. & H. R. R. R. Co.*, 163 N. Y. 228.
Champlain v. *McCrea*, 165 N. Y. 264, 275.

(8) *The petitioners have exhausted all of their remedies by appeal open to them in the courts of New York under the Civil Practice Act for the purpose of sustaining the constitutionality of Chapter 253 of the Laws of 1925, declared to be violative of the Fourteenth Amendment. Unless, therefore, they secure a hearing in this court, they will be unable to revive their action against Gould's executors, the decisions heretofore rendered constituting a finality so far as the State Courts are concerned.*

The jurisdiction of the Court of Appeals of New York is regulated by Sections 588 to 591 of the Civil Practice Act. The petitioners resorted to every proceeding which could be taken under those sections. The Special Term denied the relief for which the petitioners asked, on the

sole ground that Chapter 253 of the Laws of 1925 violated the Fourteenth Amendment. It is so stated in the order of the Court. The Appellate Division affirmed without opinion. An application was then made to that Court, under subdivision 4 of Section 588 of the Civil Practice Act, for leave to appeal to the Court of Appeals and for the certification of the constitutional question. That motion was denied.

It is to be noted that under subdivision 4 it is only the Appellate Division that can grant leave in such a case. Subdivision 5 only relates to a case where a judgment or order has been entered upon the decision of an Appellate Division of the Supreme Court which finally determines an action or special proceeding but which is not appealable under subdivision 1 of the section. Subdivision 1 refers to a case where an appeal may be taken as of right from a judgment or order which finally determines an action or special proceeding wherein is directly involved the construction of the Constitution of the State or of the United States.

After the denial of the application made to the Appellate Division, out of abundance of caution, for leave to appeal to the Court of Appeals, the petitioners appealed to that Court from the order of affirmance rendered by the Appellate Division. The Court of Appeals, however, dismissed the appeal without opinion.

Here the petitioners pursued the procedure indicated by this Court as proper in *Southern Electric Co.* v. *Stoddard*, 269 U. S. 186, and took the steps which the plaintiff-in-error in that case failed to take. Mr. Chief Justice Taft said (p. 189):

> "By the first paragraph of Section 588 of the Civil Practice Act of New York an appeal to the Court of Appeals may be taken as of right from the judgment or order entered upon a decision of the Appellate Division which finally determines an action or special proceeding where is directly involved

> the construction of the Constitution of the Sta
> or of the United States. In this case there is
> rectly involved the construction of the Constituti
> of the United States, and therefore it would see
> that an appeal could have been taken from the A
> pellate Division as of right to the Court of Appea
> *but this was not done.* Instead application w
> made to the Appellate Division to certify that
> question of law was involved in the case whi
> ought to be reviewed by the Court of Appeals, a
> that certificate the Appellate Division declin
> Thereafter no application was made to the Cou
> of Appeals to allow an appeal."

Here the petitioners appealed to the Court of Appe
from the order of the Appellate Division after the lat
had refused to certify that a question of law was involv
in the case which ought to be reviewed by the Court
Appeals.

Paragraph 5 of Section 588, which in the opinion
this Court was referred to as paragraph 4, by its ter
was not applicable to a case in which the question involv
was a constitutional question, and, therefore, the Cou
of Appeals could not have been asked to allow an appe
in such a case, the proper procedure being that pointed o
by this Court, namely, a direct appeal from the Appella
Division under subdivision 1 of the section.

This thought is emphasized in the opinion of Mr. Ch
Justice Taft in *Southern Electric Co.* v. *Stoddard* (*supra*
where, after discussing the decision in *People* v. *Americ*
Trust Co., 150 N. Y. 117, it is said (p. 190):

> "This clearly shows that in the view of the Cou
> of Appeals of New York if the order of disallo
> ance in this case involved a Federal constitution
> question, as it did on this record, it was direct
> appealable to that court from the Appellate Di
> sion under the first paragraph of Section 588. *T*
> *claimant has failed to make proper application t*
> *State court of final resort, and for that reason t*
> *writ must be dismissed.*"

We again repeat that, in the case now before this Court, the petitioners made a proper application to the State Court of final resort by appealing directly to it from the decision of the Appellate Division after the latter had denied leave to appeal to the Court of Appeals.

Whether or not the order in this case might be regarded as a final determination of an action or special proceeding, within the meaning of that term as used in the New York Civil Practice Act, it is clear under the decisions of this Court and of the Circuit Courts of Appeal following the adjudications of this Court, that there was a determination in the highest court of New York in which a decision could be had, which was "a final judgment or decree" within the meaning of Section 237 of the Judicial Code as amended by Act of February 13, 1925, and particularly subdivision (b) thereof, under which review on certiorari is now sought. Among these decisions are:

Holmes v. *Jennison,* 14 Pet. 540.
Hovey v. *McDonald,* 109 U. S. 150, 155.
Gumbel v. *Pitkin,* 113 U. S. 545, 548.
The Farmers' Loan & Trust Co., Petitioner, 129 U. S. 206, 213.
Credits Commutation Co. v. *United States,* 177 U. S. 311.
Central Trust Co. v. *Chicago, R. I. & P. Ry. Co.,* 218 Fed. Rep. 336, 339.
Stokes v. *Williams,* 226 Fed. Rep. 148.
Central Trust Co. v. *United States Light & Heating Co.,* 233 Fed. Rep. 420.

See especially:

Mt. Vernon Woodbury Cotton Duck Co. v. *Alabama Interstate Power Co.,* 240 U. S. 30, 31.
Detroit & Mackinac Ry. Co. v. *Michigan Railroad Commission,* 240 U. S. 564, 570.

In effect, the proceedings were in the nature of a bill of revivor and the decision denying the relief prayed for was final. The case, therefore, comes directly within the two decisions last cited.

The decision in the State Courts was based solely on the ground that Chapter 253 of the Laws of 1925 contravened the Fourteenth Amendment. Even if there had been also non-federal ground on which to base a decision, it was not considered by the State Court. Hence, this Court has jurisdiction to review the decision rendered.

Henderson Bridge Co. v. *Henderson City,* 173 U. S. 592, 608.

Rogers v. *Hennepin County,* 240 U. S. 184, 188, 189.

Grayson v. *Harris,* 267 U. S. 352, 358.

II.

It is respectfully submitted that in the public interest and because of the importance of the constitutional question involved a writ of certiorari should be granted.

LOUIS MARSHALL,
JAMES MARSHALL,
Petitioners' Counsel.

SUBJECT INDEX.

	PAGE
The History of the Action	1-3
The First Attempt to Revive the Action	3-5
The Present Proceeding to Revive	5-7
Question to be Adjudicated	7

Points—

I. Chapter 253 of the Laws of 1925 does not infringe any provision of the Federal Constitution. It does not deprive the New Jersey executors of George J. Gould of due process of law within the meaning of the Fourteenth Amendment 8-33

(1) The action instituted against George J. Gould to require him to account as a trustee and as one of the managers of the Pittsburgh and Toledo Syndicate survived upon his death and is enforceable against his personal representatives 8

(2) Since the cause of action against Gould survived and did not abate in consequence of his death, the petitioners were entitled to revive the action against his personal representatives, by proceedings which were merely a continuation of the old suit 8-10

(3) Since a proceeding to revive an action against a deceased defendant and to bring in his executors, does not constitute the commencement of a new action, but merely the continuance of one actually pending at the time of death, a proceeding such as that

PAGE

now under consideration constitutes due process, although the persons sought to be brought in are non-residents of the State in which the action is pending..... 11-16

(4) The provision added to Section 160 of the Decedents' Estate Law by Chapter 253 of the Laws of 1925, in unmistakable terms deals with the precise situation existing in this case. The constitutionality thereof properly came up for determination in the proceedings now sought to be reviewed and was determined adversely to the petitioners in the highest Courts of New York having jurisdiction in the premises..... 16-19

(5) Regardless of what might be the rule in the case of the revival of an action under these circumstances against administrators appointed in a foreign jurisdiction, there is a distinct differentiation in the case of executors of a will probated in a foreign jurisdiction 20-24

(6) Independently of this statute and of permissive legislation, it has been decided that actions may be maintained in the Courts of New York against foreign executors where it is necessary to prevent a failure of justice. That fact emphasizes the contention that Chapter 253 of the Laws of 1925 does not violate the due process clause..... 25-28

(7) Chapter 660 of the Laws of 1926, which undertook to repeal Section 160 of the Decedents' Estate Law, does not affect the proceedings at that time pending under subdivision 2 of Chapter 253 of the Laws of 1925..... 28-29

PAGE

(8) The petitioners have exhausted all of their remedies by appeal open to them in the Courts of New York under the Civil Practice Act for the purpose of sustaining the constitutionality of Chapter 253 of the Laws of 1925, declared to be violative of the Fourteenth Amendment. Unless, therefore, they secure a hearing in this court, they will be unable to revive their action against Gould's executors, the decisions heretofore rendered constituting a finality so far as the State Courts are concerned..... 29-33

II. It is respectfully submitted that the determination of the Supreme Court of New York which has been brought here by writ of certiorari be reversed and that it be directed to grant to the petitioners the relief prayed for..... 34

CASES CITED.

	PAGE
Allen v. Luke (163 Fed. 1018)	8
Berea College v. Kentucky (211 U. S. 45)	15
Bergdorf, Matter of (206 N. Y. 312)	24
Bergman v. Lord (194 N. Y. 70)	25
Cameron v. N. Y. & M. O. W. Co. (133 N. Y. 336)	29
Campbell v. Holt (115 U. S. 620)	17
Carey v. South Dakota (250 U. S. 118, 121)	15
Central Trust Co. v. Chicago, R. I. & P. Ry. Co. (218 Fed. 336)	33
Central Trust Co. v. United States Light & Heating Co. (233 Fed. 420)	33
Champlain v. McCrea (165 N. Y. 264)	29
Clarke v. Mathewson (12 Pet. 163)	9, 13
Close v. Noye (147 N. Y. 597)	29
Colbert v. Daniel (32 Ala. 314)	25
Credits Commutation Co. v. United States (177 U. S. 311)	33
Danforth v. Croton Water Co. (178 Mass. 472)	17
Detroit & Mackinac Ry. Co. v. Michigan Railroad Commission (240 U. S. 564)	33
Dodd v. Wilkinson (41 N. J. Eq. 566)	8
Dunbar v. Boston & Providence R. R. Corpn. (181 Mass. 383)	17
Elsasser v. Haines (52 N. J. Law 19)	15
Farmers Loan & Trust Co., The, Petitioner (129 U. S. 206)	33
Fidelity & Casualty Co. v. Freeman (109 Fed. 847)	23
Fitzsimmons v. Johnson (90 Tenn. 428)	15

PAGE

Geneva R. R. Co. v. N. Y. C. & H. R. R. R. Co. (163 N. Y. 228) 29
Gould v. Gould (122 Misc. Rep. 152) 25
Grayson v. Harris (267 U. S. 352) 33
Gumbel v. Pitkin (113 U. S. 545) 33

Harrigan v. Gilchrist (121 Wis. 127) 8
Hartnet v. Wandell (60 N. Y. 346) 24
Hazard v. Durant (19 Fed. 417) 8
Helme v. Buckelew (229 N. Y. 363) 20
Henderson Bridge Co. v. Henderson City (173 U. S. 592) 33
Hill v. Tucker (13 How. 458) 20, 22
Holmes v. Camp (219 N. Y. 359) 25
Holmes v. Jennison (14 Pet. 540) 33
Hovey v. McDonald (109 U. S. 150) 33

Logan v. Greenwich Ins. Co. (144 App. Div. 372; aff'd 203 N. Y. 611) 15
Lovejoy v. Bailey (214 Mass. 134) 8

Martin, Matter of (82 Misc. Rep. 589) 22
Michigan Trust Co. v. Ferry (228 U. S. 353) 13, 16, 22
Montgomery v. Boyd (78 App. Div. 64) 25
Mt. Vernon Woodbury Cotton Duck Co. v. Alabama Interstate Power Co. (240 U. S. 30) 33
McKnight v. Craig (6 Cranch. 187) 8
McMaster v. Gould (240 N. Y. 379) 17, 18, 20, 21
McNamara v. Dwyer (7 Paige 239) 25

Nations v. Johnson (24 How. 195) 11, 12, 16, 22

O'Brien v. Blaut (17 App. Div. 288) 8

Peaslee v. Peaslee (147 Mass. 179) 15
Pennoyer v. Neff (95 U. S. 735) 13
People v. N. Y. C. & H. R. R. R. Co. (156 N. Y. 570) . 29
Pierson v. Morgan (121 N. Y. 705) 8

PAGE

Riverside & Dan River Cotton Mills v. Menefee (237 U. S. 189) 14
Robinson v. Robbins Dry Dock & Repair Co. (238 N. Y. 271) 17
Rogers v. Hennepin County (240 U. S. 184) 33

Southern Electric Co. v. Stoddard (269 U. S. 186) ..31, 32
Stokes v. Williams (226 Fed. 148) 33

Weller v. New York (268 U. S. 319) 15
White v. White (65 N. J. Eq. 747) 15
Wineburgh v. U. S. R. R. Adv. Co. (173 Mass. 60) .. 8

STATUTES.

Decedents' Estate Law (N. Y.), Sec. 160 4

Federal Statutes Annotated, 1921 Supp., p. 236 10

General Construction Law, Secs. 93, 94 29

New York Civil Practice Act, Sec. 82 8
New York Laws of 1925, Chap. 253 4

United States Revised Statutes, Sec. 955 10